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IN THE

Supreme Court of the United States

October Term, 1949.

No. 227

THOMAS B. MORGAN,

Petitioner,

vs.

C. B. HORRALL, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California,

Respondent.

Petition of Thomas B. Morgan for Writ of Certiorari to the Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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THOMAS B. MORGAN,

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C. B. HORRALL, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California,

Respondent.

Petition of Thomas B. Morgan for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of Thomas B. Morgan respectfully prays that Writ of Certiorari issue to the Court of Appeals for the Ninth Circuit to review a final judgment of said Court entered on the 20th day of June, 1949, holding valid and constitutional Sec. 1549.1 of the California Penal Code, and affirming the decision and judgment of the District Court of the Southern District of California, Central Division.

The decision and judgment of the District Court was entered and filed on the 13th day of July, 1949.

The opinion of the Circuit Court of Appeals was filed and entered on the 20th day of June, 1949, and has not yet been reported, but for convenience is printed in an appendix to the brief filed with this petition.

Petitioner did not file a petition for rehearing.

Basis of Jurisdiction.

Jurisdiction of the Supreme Court is involved under Sec. 240 of the Judicial Code, 28 U. S. C. A. 347, now cited as Title 28, Chapter 1245 United States Code Congressional Service (1948) at page 1565.

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

Rule 38 of Title 28 U. S. C. (1946) at page 3190 states in its pertinent portion:

> "5. A review on Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reason which will be considered;
>
> Where a Circuit of Appeals . . . has decided an important question of Federal law which has not been, but should be settled by this Court; . . . or has decided a Federal question in a way probably in conflict with applicable decisions of this Court."

The opinion of the United States Circuit Court adopts the opinions rendered by the District Court of Appeal of

the State of California and the United States District Court. The reasoning and conclusion of the Circuit Court are therefore contained in the opinions of the State and District Courts and petitioner will of necessity argue his case in relation thereto.

The United States District Court has drawn and filed findings of fact and conclusions of law as well as a decision and judgment in this case. The findings of fact and conclusions of law are set out in full in the transcript of the record commencing at page 107 and continuing through page 110.

Statement of Matters Involved.

The decision of the Circuit Court involves the construction of Section 5278 of the Revised Statutes of the United States (18 U. S. C. A. 662) now cited as U. S. C. 3182 and Sec. 2, Clause 2 of Art. IV of the Constitution of the United States, the section of the Constitution just cited provides,

> "A person charged in any State with treason, felony or other crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Sec. 5278 of the Revised Statutes as amended and now titled U. S. C. 3182 reads as follows:

> "FUGITIVE FROM STATE OR TERRITORY TO STATE, DISTRICT OR TERRITORY.
>
> Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state, dis-

trict or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory, from whence the person so charged has fled, the executive authority of the State, district or territory, to which such person has fled, shall cause him to be arrested and secured and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

The basis for the construction of the aforesaid section clause and article of the United States Constitution and the United States Statutes is brought about by reason of the arrest of the petitioner Thomas B. Morgan under Section 1549.1 of the Penal Code of the State of California, which said section provides:

Section 1549.1 of the Penal Code of the State of California provides:

"The Governor of this State may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in Section 1548.2 of this Code with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand. The provisions of this chapter not otherwise inconsistent, shall apply to such cases even though the accused was not in the demanding state at the time of the commission of the crime, and has not fled

therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this Section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other state."

Petitioner initiated this cause in the United States Courts by filing a petition for a writ of habeas corpus. [Printed Rec. pp. 2 to 42, incl.]

The pertinent part of that Petition is as follows:

"During the early part of May, 1948, a requisition from the Governor of the State of Colorado, demanding the extradition or rendition of Thomas B. Morgan had been sent to the Governor of the State of California. This requisiton together with the Complaint and Affidavit in Support Thereof charged that Thomas B. Morgan had, on the 13th day of March, 1948, committed the crime of grand theft in the City of Denver, State of Colorado, and that the said Thomas B. Morgan had thereafter fled from the State of Colorado and was at the time of the making of the affidavit and the issuance of the Complaint in the State of California.

In response to a request of Thomas B. Morgan, the Governor ordered a hearing on the requisition and notified the said Thomas B. Morgan to be in the Governor's office on the 18th day of May, 1948.

At that hearing the evidence disclosed that on or about the third day of March, 1948, three men, namely, Earl Ormes, Paul Singer and Douglas Aylesworth, left the City of Los Angeles, State of California, and proceeded to the City of Denver, State of Colorado.

After arriving in the City of Denver these men procured a uniform of the type and kind worn by bank col-

lectors who usually make collections from the various stores and public places for deposit in the bank.

On the 13th day of March, 1948, Earl Ormes and Douglas Aylesworth proceeded to a department store in the City of Denver, and while Earl Ormes waited in the car, Douglas Aylesworth entered the store, dressed as a bank collector, proceeded to the office of the cashier, signed a receipt and left the store with all of the bank deposit theretofore prepared by the store. It was later discovered that this deposit consisted of $26,000 in checks and $4,000 in cash. After taking the aforesaid property these men left the City of Denver, State of Colorado. Needless to say, the money was not deposited in the bank.

The evidence produced further proved conclusively that Thomas B. Morgan was not in the City of Denver, or the State of Colorado on that or any other occasion, but on the contrary was in the State of California on the 13th day of March, 1948, at the time the theft was taking place. At the conclusion of that hearing, through his secretary, James Welch, the Governor of the State of California denied the request for a Governor's warrant of arrest, but advised the Denver authorities that he would consider a request for extradition based upon Section 1549.1 of the Penal Code of the State of California. Thereafter the Governor of the State of Colorado forwarded a second requisition for the extradition or rendition of the said Thomas B. Morgan. This second requisition was also refused because the same was not in conformity with Section 1549.1 of the Penal Code of the State of California, and thereafter the Governor of the State of Colorado forwarded a third requisiton, together with a Complaint and what purports to be affidavit of a

police officer and Aylesworth. There is also a statement by Singer, but the same does not even purport to be an affidavit. The Complaint charges that the said:

> "Thomas B. Morgan stands charged with having conspired in the City of Los Angeles, State of California to commit a crime in the City and County of Denver, State of Colorado, thus committing an act in the State of California which intentionally resulted in the commission of a crime in the State of Colorado, that is to say that he, the said Tom Morgan, did conspire to commit the crime of grand larceny contrary to the form of the statute in such cases made and provided and against the peace and dignity of the people of the State of Colorado."

Upon these documents, together with the requisition and authentication of the Governor of Colorado, the Governor of the State of California issued his warrant of arrest which is now before this court for determination as to its legality." [Printed Rec. pp. 17 to 19, incl.]

The United States District Court in and for the Southern District of California, Central Division, through the Honorable Leon Yankwich issued the Writ of Habeas Corpus, and after hearing the presentation of evidence and argument on the 6th day of July 1948, discharged the Writ and remanded appellant to custody. [Printed Rec. of Tr. pp. 92 to 106, incl.]

During the hearing and argument on the Writ of Habeas Corpus it was stipulated by all parties that appellant was not in the State of Colorado before or at the time the crime herein mentioned was committed, in other words the stipulation is that at any time material to this

case, the appellant was not in the State of Colorado. [Printed Rec. p. 123.] The respondent in his Statement of the Case before the District Court of Appeal for the State of California, stated:

> "It is admitted that the offense committed by the petitioner was that of entering into a conspiracy in the City of Los Angeles to commit a criminal offense in the State of Colorado. The petitioner was not in the State of Colorado at any of the times pertinent to the decision in this case." [Printed Rec. p. 20.]

The respondent further stated in his brief of points and authorities before the District Court of Appeal that:

> "It is admitted by the respondent that the petitioner is not a 'fugitive from Justice' within the meaning of Article IV, Sec. 2, clause 2 of the Federal Constitution, or of Sec. 662, Title 18 of U. S. C. A. If the petitioner may be extradited from the State of California it is solely by reason of the provisions of Sec. 1549.1 *et seq.* of the Penal Code." [Printed Rec. p. 20.]

Judge Yankwich also makes a specific finding of fact on that question [Printed Rec. p. 108, Finding III] and further specifically states in his opinion "He (appellant) was not in the State of Colorado at the time of the alleged Commission of the offense." [Printed Rec. p. 97.]

In the case at bar the petition for a writ of Habeas Corpus distinctly alleged as the basis for petitioner's right, that the arrest and detention of the appellant was in violation of Section 5278 of the Revised Statutes of the

United States (18 U. S. C. A., Sec. 662) and of the Constitution of the United States, in that the proposed extradition or rendition of appellant was based upon Section 1549.1 of the Penal Code of the State of California, which said section appellant contended was in direct conflict with and repugnant to Section 5278 of the Revised Statutes of the United States (18 U. S. C. A., Sec. 662) and Article IV, Clause 2, Subdivision 2 of the United States Constitution; and that Section 1549.1 of the California Penal Code is therefore null and void. There can be no doubt that this contention raised a question arising under the laws of the United States and the construction and application thereof.

The Petition for a Writ of Habeas Corpus filed by appellant in United States District Court in and for the Southern District of California, Central Division, together with its points and authorities, is set out in full in the transcript of record commencing on page 2 and continuing page 42.

The question of the repugnancy of the State Statute to the Federal Statute was advocated and tried in the Court below and that it was the substantial question involved appears unmistakingly from the opinion of the Court below which said opinion is set out in full in the transcript of record beginning at page 92 and continuing through page 106, to which record this Court may and should turn for information on this subject.

Loeb v. Columbia Twp., 179 U. S. 472, 45 L. Ed. 280, 21 Sup. Ct. Rep. 174.

Questions Raised.

The findings of fact and conclusions of law, as well as the decision and the judgment of the District Court, raise the following questions of law:

I.

May a State enact and enforce a Statute which by its terms admittedly involve a field covered by the United States Constitution and by Federal Statutes which said State Statute conflicts with and is opposed to the wording and necessarily implied meaning of the Constitution of the United States and the Federal Statute; in that both the Constitution and the Federal Statute requires that a person charged must have been in, and fled from a State to become a fugitive from justice?

II.

Must the affidavit in support of the complaint issued in an extradition proceedings be made of the affiant's own knowledge or may it be based upon, hearsay, conjecture and probability?

III.

Is a warrant issued by the Governor of the asylum State valid where said warrant provides that the same is based upon a peculiar State law and also provides that it is issued in pursuance of the Constitution and laws of the United States when said State Statute and the Constitution and Federal laws are repugnant one to the other?

IV.

In extradition matters, may a demanding State rely upon the laws of the asylum State to charge a crime against the laws of the demanding State where such demanding State does not have any law pertaining to the particular situation?

V.

Where the laws of the demanding State do not provide for extradition under circumstances that the demanded person was never in the demanding State, may such demanding State charge a crime against itself by alleging and charging a crime under the laws of the asylum State?

The people of the United States and all of the States in the Union have a vital interest in the questions raised which said questions have never before been authoritatively raised, and which have been by the lower Court decided probably in conflict with decisions bearing upon the subject.

Reasons Why Petitions for Certiorari Should Be Granted.

The uniform extradition law and in particular that portion covered by Section 1549.1 of the Penal Code of the State of California has been adopted by a large number of States but has never before been decided by this or any other lower Federal Court.

Decisions of the lower Court seem to be in direct conflict with all of the decisions of this Court on related subjects.

The necessary and proper documents to support a complaint on extradition is a question that should be settled clearly and conclusively for the benefit of all of the United States, and under present decisions the proper and requisite acts and conduct are vague and uncertain.

Citizens of the United States should not be deprived of their liberty on extradition matters on warrants so drawn that it is impossible for the citizen to successfully defend himself in a court of law by reason of inability to determine whether he is charged under Federal or State law. A rule governing such warrants should be made.

Prayer.

WHEREFORE, your petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the 9th Circuit, directing said Court to stay all proceedings in this case pending determination of the issues involved in the Petition and directing that Court to certify and send to this Court for its review and determination on a day certain to be named in the writ, a full and complete transcript of the record in its appeal, Thomas B. Morgan, Appellant, v. C. B. Horrall, Chief of Police of the City of Los Angeles, Appeal No. 12021, and the record in the District Court in the same case identified as Civil Action No. 8350-Y and that your petitioner be allowed to fully present his case to this Court.

Dated at Los Angeles, California, this 27th day of July, 1949.

JOSEPH D. TAYLOR,
Attorney for Petitioner.

RICHARD A. HALEY,
Of Counsel.

Certificate of Counsel.

Joseph D. Taylor, Attorney for Petitioner, affirms that this petition for Writ of Certiorari is brought in good faith, and in the conscientious and honest belief that the matters contained therein should be determined by the Supreme Court of the United States, and said Petition is not brought for the purpose of delay or otherwise.

Dated this 27th day of July, 1949.

JOSEPH D. TAYLOR,
Attorney for Petitioner.

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No.....

THOMAS B. MORGAN,

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C. B. HORRALL, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Section 1549.1 of the Penal Code of the State of California Is Invalid in Conflict With or Repugnant to the Provisions of the United States Constitution and With the Act of Congress of the United States.

The question herein involved is one never before decided by any Federal Court. The Statute being one enacted in 1937 by several of the United States under a title of Uniform Expedition Law and this Section has been referred to in decisions from four different states. (*Cassis v. Fair* (W. Va.), 29 S. E. 2d 245, 248; *Ennist v. Baden* (Fla.), 28 S. E. 2d 160, 162; *English v. Matowitz* (Ohio), 72 N. E. 2d 898, 900; *Ex Parte Campbell* (Neb.), 25 N. W. 2d 419, 423; *Culbertson v. Sweeney* (Ohio App.), 44 N. E.

2d 807, 810; appeal dismissed, 140 Ohio St. 426, 45 N. E. 2d 118, "for the reason that no debatable constitutional question is involved.")

This Section was also decided in the instant case by the District Court of Appeal in and for the State of California Second Appellate District, Division 2, the opinion of that Court is set forth in full in the printed record commencing on page 5 and continuing through page 15.

Petitioner, however, maintains that the decisions and opinions of the United States Supreme Court and the Federal Circuit Courts of Appeal cited and quoted in this brief are conclusive upon the subject.

Innes v. Tobin, 240 U. S. 127, 60 L. Ed. 562, 36 Sup. Ct. Rep. 290:

> "That prior to the adoption of the Constitution fugitives from justice were surrendered between the states conformably to what was deemed to be the controlling principles of comity. (citing cases.) That it was intended by the provision of the Constitution to fully embrace or rather to confer authority upon Congress to deal with such subject, (citing cases). That the Act of 1793 (now Revised Statutes Sec. 5278, Comp. Stat. 1913 Sec. 10126) was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and that its provisions were intended to be dominate, and so far as they operated, controlling and exclusive of state power (citing cases). * * *
>
> Coming in the light of these principles to apply the statute it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one state for removal as a fugitive to another where it clearly appears that

the person was not and could not have been a fugitive from the justice of the demanding state. (citing cases.) * * *

And the second because while it is undoubtedly true that in the decided cases relied upon (Kentucky v. Dennison, 24 Howard 66; Roberts v. Rielly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311). The exclusive character of the legislation embodied in the statute was recognized, those cases when rightly considered go no farther than to establish the exclusion by the statute of all state actions from the matters for which the statute expressly or by necessary implication provided."

The right of a state to demand the extradition or rendition by another state of a person who has committed an offense against its laws is founded on and controlled by the Constitution of the United States and effectuating federal statutes. It is not dependent upon interstate comity, courtesy, or contract. (35 Corpus Juris Secundum 318-19.) Extradition being a federal and not a state matter, the federal law and not the state law is supreme, and any state legislation which conflicts with the federal law on the subject, as embodied in the Constitution and effectuating statutes, is unconstitutional and void. (35 C. J. S. 319-20.)

Constitutional and statutory provisions relating to interstate extradition should be liberally construed to effectuate their purposes, but since such provisions involve the substantial rights of citizens, these essential elements and requirements have been required to be strictly followed. (35 C. J. S. 320.)

In *Ex Parte Morgan,* 20 Fed. 298 and in *In re Doc Woon,* the court said:

> "The executive of the asylum state in allowing the requisition of the executive of the demanding state, acts under the authority of the United States Statutes and he must conform to its directions and limitations."

In a later case of *Unied States v. Mayering,* 75 F. 2d 716 the court reiterated its former law and said:

> "Extradition proceedings are no creatures of state law, but are controlled by the Constitution of the United States Article 4 No. 2 and by Sections 5278 and 5279 of the Revised Statutes, 118 U. S. C. A. Sections 662-663) passed thereunder, Smith Hurd St. Ill. c. 60 Sec. 1, Cahill Ill. Rev. Sta. Sec. 60, par. 1, People v. Meyering, 357 Ill. 166, 191 N. E. 318, People v. Baldwin, 341 Ill. 604, 174 N. E. 51.
>
> * * * * * * * *
>
> "The Statute (Rev. St. Sec. 5278 (18 U. S. C. A. 662)) clearly requires the requisition issued by the demanding governor to contain copy of an indictment found or affidavit made before a magistrate * * * charging the person demanded with having committed a crime therein certified as authentic by the governor * * * of the state from whence the person so charged has fled (citing cases).
>
> * * * * * * * *
>
> "The statute is one involving the substantial rights of citizens and its essential elements must be strictly followed Ex Parte Morgan (D. C. 20 Fed. 298 and Ex Parte Harte (C. C. A.) 63 Fed. 249, 28 L. R. A. 801). Only by faithfully following the provisions of the statute may a person be lawfully

deprived of his liberty and extradited from an asylum state to another state, there to be tried for the commission of a crime. The alleged fugitive has a right not to be imprisoned or dealt with by the states in disregard of those safeguards provided by the Constitution and statutes of the United States. Compton v. Alabama, 214 U. S. 1-6, 29 S. Ct. 605, 53 L. Ed. 895, 16 Ann. Cases 1098."

The case of *Day v. Klein,* 2 F. 2d 966 would seem to settle for all time the question as to what laws and conditions must be followed and met when the court announced:

"The intention of the framers of Article 4 of the Constitution was to embrace fully the subject of the rendition between the states of fugitives from justice and to confer authority upon Congress to deal with that subject. Innes v. Tobin, 240 U. S. 127, 36 S. Ct. 290, 60 L. Ed. 562. The act now codified as section 5278 of the Revised Statutes was enacted for the purpose of controlling the subject of interstate rendition and its provisions were intended to dominate and as far as they operated [27] controlling and exclusive of state power. One who is held in custody contrary to the provisions of that statute is therefore detained in violation of the Constitution and laws of the United States. * * *"

Within the meaning of constitutional and statutory provisions governing interstate extradition a "fugitive from justice" may be defined as a person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within the territory of another when it is sought to subject him to the criminal processes of the former state." (35 C. J. S. 324.)

In the case of *Hyatt v. New York ex rel Cockran,* 188 U. S. 691, the court had before it the very problem here involved, and said:

> "We are of the opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed. * * *
>
> "It is, however, contended that a person may be guilty of larceny or false pretenses within a state without being personally present in the state at the time. Therefore the indictments found were insufficient justification for the requisition and for the action of the Governor of New York [28] thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he has been indicted, assuming that he committed them outside the state. * * *
>
> "The language of Section 5278 Revised Statutes provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice, by the executive authority of a state *to which such person has fled,* and it provides that a copy of an indictment found or affidavit made before a magistrate of any state charging the person demanded with having committed treason, etc., certified as authentic, by the

Governor or chief magistrate of the state or territory *from whence the person so charged has fled,* to cause him to be arrested and secured. Thus the person who is sought must be the one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when the fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he has not been present? This is neither a narrow, nor as we think, an incorrect interpretation of the statute. * * *

We think the plain meaning of the act requires such presence, and that it is not intended to include as a fugitive from justice of a state, one who has not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact fled therefrom."

This case further in its opinion reviews the cases of *Ex Parte Ruggell,* 114 U. S. 642; *Roberts v. Rielly,* 116 U. S. 80; *Cook v. Hort,* 146 U. S. 183; *Kentucky v. Dennison,* 24 Howard 16, and *Re White,* 5 C. C. A. 29, 14 U. S. p. 84.

In the case of *Tennessee v. Jackson,* 36 Fed. 258, the court reached the same conclusion as that in *Wyatt v. New York ex rel. Cockran.* See also *Ex Parte Montgomery,* 244 Fed. 967 (affirmed 246 U. S. 656, 38 S. Ct. 424,

62 L. Ed. 924); *Kenney v. State,* 88 Fla. 354 (102 So. 547]); *Fitzpatrick v. William,* 46 F. 2d 40; *State v. Ovegg,* 91Fla. 197 L. 107 So. 409-411).

In the State of California the question has likewise been determined *in the Matter of Application of Shoemaker,* [30] 25 Cal. App. 551, at 557, the court said:

> "It must appear to the Governor of a state to whom such a demand is presented before he can lawfully comply with it: 1. That the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment or an affidavit certified or authenticated by the Governor of the state making the demand; or, 2. That the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law and is always open upon the face of the papers in judicial inquiry, on an application for a discharge under a Writ of Habeas Corpus. * * *
>
> "It will be observed that in that case the court in effect holds that the judicial review of proof offered in rebuttal of the *prima facie* showing involved in the finding of the executive that the prisoner is a fugitive from justice of the demanding state will be made and if thereupon it is considered sufficient to overthrow the presumption arising from the decision of the Governor that the prisoner is such a fugitive, he will be discharged on habeas corpus. And we are unable to understand how the rule would be otherwise and be just. It is indeed a necessary corollary of the second prerequisite as stated in the above opinion and without the existence and showing of which the Governor would be without legal authority to comply with the request of the demanding state."

The question has once been before the Courts of the State of California in the case of *In re Brewer,* 61 Cal. App. 2d 388. While this case was decided upon the point that the demand and complaint were not in compliance with Sec. 1548.2 or 1549.1 the court nevertheless reviewed all of the pertinent law on the subject. A large number of cases are cited in this opinion, and petitioner has not cited said authorities herein for the reason that the pertinent portions thereof are clearly set forth therein. It is also to be noted that this case expressly disapproves of the case of *In re Gornostoyoff,* 113 Cal. App. 225:

> "Actual and corporeal, former presence in the demanding state is essential; if a person was only constructively in a state, committing a crime against it while not personally within its borders he has not fled from it and is not a fugitive from justice." (35 C. J. S. 325.)

That section 1549.1 of the California Penal Code directly conflicts with and is repugnant to Section 5278 of the Revised Statutes could not be more clearly enunciated or stated than it was when the Court in the case of *Innis v. Tobin* hereinabove stated "coming in the light of these principles to apply the statute it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one state for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding state."

II.

The Papers Submitted to the Governor of the State of California Were Insufficient to Authorize the Governor to Obtain the Arrest of Appellant Upon a Governors Warrant and His Removal From the State of California to the State of Colorado.

Certain papers accompanying the Complaint are alleged to be affidavits in support of the Complaint, but these documents fall short of the affidavits required by Sec. 5278 of the Revised Statutes of the United States (18 U. S. C. A. 662). These affidavits are set forth in the printed record commencing at page 56 and continue through page 86.

The document executed by Fred Staab is hearsay, even though the same purports to be made by the affiant's own knowledge. A reading of the aforesaid document reveals that the events related therein are based upon the statements made to him by Mr. Paul Singer and Mr. Douglas Aylesworth. It is certainly true that Mr. Staab could not testify concerning Mr. Morgan as to things that were told to him by these other two persons.

In the case of *Rafferty v. Bligh,* 55 F. 2d 189, the Court said:

> "It is well settled that the affidavit called for by Section 5278 when so construed, is an affidavit stating facts of the affiant's own knowledge, which would be admissible as evidence and sufficient to warrant a finding of probable cause of the commission of the

offense by the person charged therewith. Ex Parte Harte (C. C. A.) 63 Fed. 249, 28 L. R. A. 801, See also the following cases with reference to Sec. 3246 of the Revised Statutes (26 U. S. C. A. Sec. 1195) and the 4th Amendment of the Constitution; Wagner v. United States (C. C. A.) [42] 8 Fed. (2d) 581, 584, 585, Schencke v. United States, 55 App. D. C. 84, 2 Fed. (2d) 185; Rice v. United States (C. C. A.) 24 Fed. (2d) 479, 480; Ripper v. United States (C. C. A.) 178 Fed. 24, 26. 24 Op. Attys. Gen. 685. * * *

"As the demand and the warrant were based on the complaint and the accompanying affidavit of Officer Mullen of which the dying declaration of Woo Sam was a part, the question arises whether they state facts competent as evidence and of the affiant's own knowledge from which the Governor of Massachusetts could find probable call for issuing his warrant.

"The *realator's* contention is that the facts stated in Mullen's affidavit and the complaint are not of his own knowledge; that it appears from the affidavit that the facts stated in it and in the complaint are facts most of which are contained in the alleged dying declaration of Woo Sam, a part of the Mullen affidavit."

Although not directly in point, the case of *Ex Parte Spears,* 88 Cal. 640, recognizes the necessity of the rule that the affidavit must be made from facts of affiant's own knowledge.

The warrant, complaint and affidavits are further insufficient for the reason that none of the affidavits are certified to by the Governor of the State of Colorado.

The case of *United States Ex. Rel. McCline v. Mayering* [43], 75 F. 2d 716, is an authority to the effect that the affidavits in support of the warrant must be authenticated by the governor of the demanding state.

Petitioner here is not concerned with the affidavit of Emma Hoelzle, Margaret M. Phillips or Ross L. Hennerman, since those affidavits do not charge this petitioner with committing a crime. The document that purports to be an affidavit of Douglas Aylesworth is simply notarized by a person who purports to be a notary public, with no other certification of any nature.

In addition to all of the foregoing, none of the documents are in conformity with Sections 1904, 1905 and 1923 of the Code of Civil Procedure of the State of California.

III.

The Appellant Was Illegally Committed to Custody for the Reason That the Warrant of the Governor of the State of California Is Fatally Defective.

The warrant of the Governor of the State of California for the arrest of the petitioner herein reads as follows:

"STATE OF CALIFORNIA

Executive Department

The People of the State of California, to Any Sheriff, Constable, Marshal, or Policeman of This State, Greeting:

Whereas, it has been represented to me by the Governor of the State of Colorado that Tom Morgan stands charged with the crime of Committing Acts in the State of California Intentionally resulting in a crime in the State of Colorado, to wit: Conspiracy to Commit Grand Larceny, committed in the County of ....., in said State, and that he fled from the justice of that State, and has taken refuge in the State of California, and the said Governor of Colorado having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said Tom Morgan to be arrested and delivered to Wm. E. Flor, who is authorized to receive him into his custody and convey him back to the State of Colorado,

And Whereas, the said representation and demand is accompanied by a copy of complaint and supporting papers certified by the Governor of the State of *California* to be authentic, whereby the said Tom Morgan is charged with said crime; and it satisfactorily appearing that the representations of said Governor are true, and that said Tom Morgan is a fugitive from the justice of the aforesaid State,

You Are, Therefore, required to arrest and secure the said Tom Morgan wherever he may be found within this State, and to deliver him into the custody of said Wm. E. Flor, to be taken back to the State from which he fled, pursuant to the said requisition, he, the said Wm. E. Flor, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

In Witness Whereof, I have hereunto set [49] my hand and caused the Great Seal of the State to be affixed, this 4th day of June in the year of our Lord one thousand nine hundred and forty-eight.

(Seal) EARL WARREN
Governor of the State of Calfornia

By the Governor:
FRANK M. JORDAN
Secretary of the State of California [50]"

[Tr. of Rec. pp. 44 and 45.]

It is readily apparent that the warrant hereinabove quoted defeats itself, in that the warrant purports first to state that the appellant Tom Morgan committed acts in the State of California intentionally resulting in a crime in the State of Colorado, and immediately thereafter states that he has fled from the justice of that state and has taken refuge in the State of California, and that the officer Wm. E. Flor is authorized to convey him back to the State of Colorado; and in the final paragraph states that the said Wm. E. Flor is to take the appellant back to the state from which he fled. The inconsistencies in this warrant make it impossible to determine whether the Gover-

nor of the State of California has or has not determined that Mr. Morgan, the appellant, was ever in the State of Colorado.

The warrant in its second paragraph states, and the said Governor of Colorado having in pursuance of the Constitution and laws of the United States demanded of me that I shall cause the said Tom Morgan to be arrested and delivered to Wm. E. Flor, who is authorized to receive him into his custody and convey him back to the State of Colorado.

If the Governor of the State of California was exercising his authority under and by virtue of Section 1549.1 of the Penal Code of the State of California, then he was not acting in pursuance of the Constitution or the laws of the United States. If on the other hand, he was acting in pursuance of the Constitution and laws of the United States then his warrant is fatally defective for the reason that the appellant Thomas Morgan was never in the State of Colorado. (*In re Doo Woon,* 18 Fed. 898; *Ex Parte Morgan,* 20 Fed. 298; *In re Veasey,* 196 N. C. 662, 146 S. E. 599; *Sivley v. Hockett,* 161 Tenn. 602, 33 S. W. 2d 422; *Huston v. Clark,* 121 Fla. 161, 163 So. 471.

The Governor of the State of California's warrant is also defective in that the third paragraph therein recites that the complaint and supporting paper were certified by the Governor of the State of California to be authentic. The only authentic papers must be those certified by the Governor of the State of Colorado.

IV.

The Complaint Issued by the Magistrate's Court in the State of Colorado Does Not Charge a Crime Against the Laws of the State of Colorado.

The State of Colorado does not have a statute similar to Section 1549.1 of the California Penal Code, nor any statute or law pertaining to the actions of persons outside of that State. The complaint upon which demand for requisition was made is copied directly from Section 1549.1 of the California Penal Code, and not from any of the laws of the State of Colorado.

Therefore, while it may be conceded that appellant violated the laws of the State of Colorado, he is not in the present complaint so charged, but is charged with having committed a crime against the laws of the State of California. It must be conceded that the crime charged must be one against the laws of the demanding State.

Roberts v. Rielly, 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291;

U. S. v. Mayering, 75 F. 2d 716.

Prayer.

WHEREFORE, your petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeal for the 9th Circuit, directing said Court to stay all proceedings in this case pending determination of the issues involved in the Petition and directing that Court to certify and send to this Court for its review and determination on a day certain to be named in the writ, a full and complete transcript of the record in its appeal, Thomas B. Morgan, Appellant, v. C. B. Horrall, Chief of Police of the City of Los Angeles, Appeal No. 12021, and the record in the District Court in the same case identified as Civil Action No. 8350-Y and that your petitioner be allowed to fully present his case to this Court.

Dated at Los Angeles, California, this 27th day of July, 1949.

JOSEPH D. TAYLOR,
Attorney for Petitioner.

RICHARD A. HALEY,
Of Counsel.

APPENDIX "A."

OPINION.

Appearances:

For the Petitioner: Richard A. Haley, Los Angeles, California.

For the Respondents: Ray L. Chesebro, City Attorney; Donald M. Redwine, Assistant City Attorney; John L. Bland, Deputy City Attorney; Frank Richards, Deputy Attorney General State of California, all of Los Angeles, California. [97]

Yankwich, District Judge:

I.

INTERSTATE EXTRADITION.

The Constitution of the United States provides that a person charged in any State with treason, felony or other crime, who flees from justice, and is found in another State, shall be delivered to the State having jurisdiction of the crime on demand of the Executive authority of such State. (1)

The object of this provision, which in the identical language appeared first in the Articles of Confederation of 1781, has been stated by the Supreme Court in this manner:

> "The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another.

Lascelles v. Georgia, 148 U. S. 537. Such a provision was necessary to prevent the very general requirement of the State constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended to be. Its design was, and is, in effect, to eliminate for this purpose, the boundaries of States, so that each may reach out and bring to speedy trial offenders [98] against its laws from any part of the land.

"Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose, with the result that one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one State, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning." (2)

Three conditions must concur before a person can be extradited. They are stated by the Supreme Court in a leading case:

"No person may be lawfully removed from one State to another by virtue of this provision, unless: 1, He is charged in one state with treason, felony or other crime; 2, he has fled from justice, 3, a demand is made for his delivery to the State wherein he is charged with crime. If either of these conditions are absent, the Constitution affords no warrant for a restraint of the liberty of any person." (3)

The designation of the crimes within the constitutional provision has been held comprehensive enough to embrace [99]

> "any offense, whatever its nature, which the State, consistently with the Constitution and laws of the United States, may have made a crime against its laws." (4)

The Courts have been equally liberal in determining who is a fugitive. Perhaps the broadest statement is this:

> "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." (5)

II.

Implementing Legislation.

To give effect to this constitutional clause, the Congress enacted, on February 12, 1793, a statute which is the source of the present provision in the Criminal Code, the main portion of which, so far as material to this inquiry, reads:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from [100] justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit

made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." (6)

All States, including California, have statutes relating to the procedure to be followed when demand for extradition is addressed to their authorities. The California law now in effect derives from a uniform criminal extradition statute which has been adopted by a large number of states. (7) The procedure, in substance, provides for honoring by the Governor of the State of a demand for extradition, for the issuing of a warrant of arrest, and the taking of the arrested person before a magistrate. On the whole, ample opportunity is given for questioning the validity of the extradition to satisfy the most punctilious observance of the requirements of due process. Here we are concerned only with certain specific clauses of the statute. The first of these [101] reads:

"The Governor of this State may also surrender, on demand of the executive authority of another State, any person in this State charged in such other State in the manner provided in Section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The

provisions of this chapter, not otherwise inconsistent shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime, and has not fled therefrom." (8)

its application to the present case is brought into play by undisputed facts.

On June 4, 1948, the Governor of California honored a demand for extradition by the Governor of Colorado, dated May 27, 1948. The petitioner was arrested pursuant to a warrant of arrest issued thereafter, and placed in the custody of the Chief of Police of Los Angeles. On June 7, 1948, he applied for a writ of habeas corpus in the District Court of Appeal of California for the Second District, Division Two. That court heard the matter on June 9, 1948, and on June 15, 1948, discharged the writ. A petition for a similar writ filed in the Supreme Court of California on June 16, 1948, was denied on June 21, 1948. The present petition was filed on June 23, 1948, and a writ issued by me on the same day, returnable on June 25, 1948. [102]

The petitioner has been for many years a resident of Burbank, Los Angeles County, California. The offense with which he is charged in Colorado is conspiracy to commit grand larceny, a crime denounced by Colorado statutes. (9) He was not in the State of Colorado at the time of the alleged commission of the offense. And the inquiry centers around the proposition whether he was a fugitive within the meaning of the pertinent constitutional clause and the federal statute implementing it. This, in turn, brings up the question whether the

provision of the California statute which allows extradition in cases where

> "the accused was not in the demanding State at the time of the commission of the crime and has not fled therefrom" (10)

is constitutional.

III.

Constitutionality of California Statute.

The petitioner contends that it is not. He urges that it conflicts both with the constitutional provision and the federal statute. It may be conceded that the federal statute (11) does not, in so many words, apply to instances of offenses committed in the State by a person not *person* in it at the time of the commission. Nevertheless, it is accepted doctrine that a State may punish acts committed beyond its boundaries which result in a crime within the State. As said by Mr. Justice Holmes:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the [103] harm as if he had been present at the effect, if the State should succeed in getting him within its power." (12)

And the decisions of the Supreme Court, interpreting the federal statutes under consideration have held that the commission of an offense in a State while the defendant is actually not physically present, come within the purview of the constitutional provision. (13) These cases stress the fact that the important factor in determining the matter

is not so much physical presence of a person in a State but

> "having within a state committed that which by its laws constitutes a crime." (14)

This being so, state legislation in aid of the federal statute which governs such situations cannot be said to conflict with the letter or spirit of the constitutional provision. (15) And high state courts which have had occasion to pass on such statutes have so ruled. (16) The District Court of Appeal followed these pronouncements in the opinion filed in this case. (17)

As these cases relate to federal constitutional interpretation, they are not binding on us. However, a study of them, in the light of the principles to which we have already alluded in the first portion of this opinion, leads us to the conclusion that they interpret the constitutional grant of power correctly, and that such interpretation should command our accord. State legislation which merely supplements a field covered by federal statute does not involve any constitutional infirmity, when, as is the case here, it merely covers a situation which, while not [104] specifically covered by federal legislation, is within the spirit of the constitutional provision pursuant to which it was enacted, as interpreted by our highest courts. (18)

A group of cases which I mentioned at the hearing, lend support to this conclusion. I refer to the cases which hold that a state parolee who has departed from the State which paroled him with the consent of the authorities, and, afterwards, while in another state, commits a violation of his parole, may be extradited, whether the state statute

makes specific provision for such contingency or not. (19) We quote from one of them:

> "The law is also settled that a paroled prisoner who has, in violation of parole, left the State in which he was convicted of crime, is, within the Constitutional provision in question, a person charged with crime in, the State where he was convicted and one who has fled from the justice of that State, so that he is subject to extradition. Drinkall v. Spiegel, 1896, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486; Hughes v. Pflanz, 6 Cir., 1905, 138 Fed. 980. It is also settled that a paroled prisoner who has left the State of conviction pursuant to the terms of his parole, but later violated the same, is a person charged with crime and a fugitive from justice subject to extradition. People ex rel. Hutchings v. Mallon, 218 App. Div. 461, 218 N. Y. S. 432, affirmed without opinion 1927, 246 N. Y. S. 521, 157 N. E. 842; Ex parte Nabors, 1928, 33 N. M. 324, 267 P. 58." (20) [105]

The following language is also singularly appropriate:

> "The Constitutional provision and the procedural statute were intended to provide a summary executive proceedings, by the use of which the closely associated states of the union could promptly aid one another in bringing to trial persons accused of crime in one state, but found in another beyond the reach of the state where the crime was committed. To this end, the courts have given the Constitution and statute a liberal construction in order to effectuate and expedite the administration of justice in the several states. Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 62 L. Ed. 193; Appleyard v. Massachusetts, 203 U. S. 222, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; Lascelles v. Georgia, 148

U. S. 637, 13 S. Ct. 687, 37 L. Ed. 549; Roberts v. Reilly, 116 U. S. 80, 94, 6 S. Ct. 291, 29 L. Ed. 544; Ex parte Reggel, 114 U. S. 642, 650, 5 S. Ct. 1148, 29 L. Ed. 250; Commonwealth of Kentucky v. Dennison, 24 How. 66, 104, 16 L. Ed. 716; Ex parte Anthony, 198 Wash. 106, 87 P. (2) 302.

"The only prerequisites to extradition from one state to another are, that the person sought to be extradited is substantially charged with a crime against the laws of the demanding state, and that he is a fugitive from justice." (21)

It is obvious that if a person commits in a State an act which amounts to violation of his parole in another State, [106] he may be considered a fugitive from justice, a State may, without doing violence to any constitutional prohibition, provide that one who, within its boundaries, commits an act which is denounced as a crime by another State may be extradited to that State.

The conclusion is, therefore, inescapable that the California statute under consideration has no constitutional infirmity.

IV.

Sufficiency of Record, Availability of Remedy Sought.

What has just been said disposes of the chief contention in the case. We consider briefly others.

The Complaint issued by a Justice of Peace at Denver, Colorado, the warrant of arrest and the affidavits in the case filed with the Governor of California, are a sufficient compliance with the federal statute. (22) Courts have been very liberal in interpreting the requirements

of this section. They have held, in effect, that any method prescribed by the demanding State for the institution of a criminal proceeding and which is the basis for the issuance of a warrant of arrest satisfies the quantum of proof of the statute. (23) Nor is there merit to the contention of the respondent that other remedies have not been exhausted. Admittedly, the rule is that the petitioner must use up all his available methods of relief before resorting to a writ of habeas corpus in the federal district court. However, the principle does not apply to situations in which such resort would be unavailing, or would not achieve the result sought. (24) This was the situation here. The only possible recourse other than habeas [107] corpus left to the petitioner was a petition for certiorari in the Supreme Court of the United States after the Supreme Court of California had refused a writ. When the District Court of Appeal discharged the writ, the petitioner was taken into custody, in which he remained until admitted on bond when the writ was returned before me. When the present petition was filed, officers from Colorado were here to take him in charge and transport him to Colorado. Only two days elapsed from the denial of the writ by the Supreme Court of California and the filing of this petition. It would have been a physical impossibility to prepare and file with the Clerk of the Supreme Court of the United States at Washington, a petition for writ of certiorari. And it was stated at the hearing, and is undisputed, that counsel for the petitioner had been informed by the Clerk of the Supreme Court of California that it was not customary for that court to grant stays pending the filing and determination of such petition. Any wait, therefore, would have rendered the question moot, because the petitioner would have been transported to the

State of Colorado before any action could have possibly been taken on it. So application for relief from the Supreme Court of the United States would have been an idle gesture.

It follows that the petitioner resorted to the only means left to him for questioning the right of the State of California to surrender him,—namely, a petition for writ of habeas corpus in this court. (25) Jurisdiction to entertain it is, therefore, present. However, for the reasons indicated, the [108] writ should be, and is hereby discharged, and the petitioner remanded to the custody of the Chief of Police of Los Angeles.

Dated this 6th day of July, 1948.

LEON R. YANKWICH
United States District Judge [109]

NOTES TO TEXT.

1. United States Constitution, Article 4, Section 2, Clause 2.
2. Biddinger v. Commissioner of Police, 1917, 245 U. S. 128, 132; Jackson v. Meyerling, 1931, 7 Cir., 54 F. (2) 621.
3. Pierce v. Creecy, 1908, 210 U. S. 387, 401: The only question for determination in such case is whether the petitioner is held in violation of federal law, not whether he is guilty. South Carolina v. Bailey, 1933, 289 U. S. 412, 420-421; United States v. Superintendent of County Prisons, 1940, 3 Cir., 111 F. (2) 409, 411-412.

4. Commonwealth v. Dennison, 1860, 24 Howard 66, 101-103; Appleyard v. Massachusetts, 1906, 203 U. S. 222, 227; and see, Ex parte Reggel, 1885, 114 U. S. 642, 649-650.
5. Roberts v. Reilly, 1885, 116 U. S. 80, 87. (Emphasis added.)
6. 18 U. S. C. A. 662.
7. Penal Code of California, Secs. 1548-1558.
8. Penal Code of California, Sec. 1549.1.
9. 1935 Colorado Statutes, Chapter 48, Sec. 177.
10. Penal Code of California, Secs. 1549-1549.1.
11. 18 U. S. C. A., Sec. 662.
12. Strassheim v. Daily, 1911, 221 U. S. 280, 285; and see 14 Am. Jur., Criminal Law, Sec. 227; Hyde v. United States, 1912, 225 U. S. 347, 362-366; King v. United States, 1944, 144 F. (2) 729, 731.
13. See cases cited in Footnotes 2, 3, 4, and 5.
14. Roberts v. Reilly, supra, at p. 97. (Emphasis added.)
15. Hines v. Davidowitz, 1941, 312 U. S. 52, 66-67, and cases [110] cited in Footnotes 20, 22, 23 to case; 22 Am. Jur., Extradition, Sec. 9, pp. 249-250; Innes v. Tobin, 1916, 240 U. S. 127, 134-135; In re Tenner, 1942, 20 C. (2) 670, 676; In re Harris, 1946, 309 Mass. 180, 34 N. E. (2) 504.

16. Cassis v. Fair, 1944, 126 W. Va. 557; 29 S. E. (2) 245, 248; Culbertson v. Sweeney, 1942, 70 Ohio App. 344, 44 N. E. 807, 810. The Supreme Court of Ohio dismissed an appeal from this decision

> "for the reason that no debatable constitutional question is involved." (Culbertson v. Sweeney, 1942, 140 Ohio St. 426, 45 N. E. (2) 118.)

Ennist v. Baden, 1946, 158 Fla. 141, 28 So. (2) 160; English v. Matowitz, 1947, Ohio, 72 N. E. (2) 898; Ex parte Campbell, 1946, 147 Neb. 820, 25 N. W. (2) 419, 423.

17. In re Thomas B. Morgan, Crim. No. 4248, decided on June 15, 1948, not yet officially reported.

18. 22 Am. Jur., Extradition, Sec. 9, pp. 249-250; 25 C. J. S., Extradition, Sec. 2, p. 320. In Innes v. Tobin, 1916, 240 U. S. 127, 134-135, Mr. Chief Justice White gives an unanswerable reason for this view:

> "* * * while it is undoubtedly true that in the decided cases relied upon (Kentucky v. Dennison, supra; Roberts v. Reilly, supra; Hyatt v. Corkran, supra) the exclusive character of the legislation embodied in the statute was recognized, those cases when rightly considered go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly [111] or by necessary implication provided.
>
> "No reason is suggested nor have we been able to discover any, to sustain the assumption that the

framers of the statute in not making its provisions exactly coterminous with the power granted by the Constitution did so for the purpose of leaving the subject so far as unprovided for beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt."

19. Reed v. Colpoys, 1938, U. S. App. D. C., 99 F. (2) 396; Brewer v. Goff, 1943, 10 Cir., 138 F. (2) 710; see 25 C. J. S., extradition, Sec. 10(2), pp. 327, 328.

20. Reed v. Colpoys, 1938, U. S. App. D. C., 99 F. (2) 396. (Emphasis added.)

21. Brewer v. Goff, supra, at pp. 711-712. [112]

22. 18 U. S. C. A., Sec. 662. See, Munsey v. Clough, 1905, 196 U. S. 364, 372-373; Daugherty v. Hornsby, 1945, 5 Cir., 151 F. (2) 799.

23. 35 C. J. S., Extradition, Sec. 14, pp. 333-338; Raftery v. Bligh, 1932, 1 Cir., 55 F. (2) 189, 194-198; Riley v. Colpoys, 1936, U. S. App. D. C., 85 F. (2) 282; United States v. O'Brien, 1943, 138 F. (2) 217, 218.

24. Ex parte Hawk, 321 U. S. 114, 117-118; White v. Ragen, 1945, 324 U. S. 760, 764-767; Huse v. Mayo, 1945, 324 U. S. 42.

25. In Gordon v. Scudder, 1947, 9 Cir., 163 F. (2) 518, upon which the Respondent relies in challenging our jurisdiction, the petitioner was confined in a state institution. Delay would not have affected the assertion of his illegal detention. Hence an application for a writ of certiorari was a condition precedent to his petitioning to the federal district court for relief of the type sought here.

[Endorsed]: Filed Jul. 6, 1948. Edmund L. Smith, Clerk. [113]

APPENDIX "B."

In the United States Court of Appeals for the Ninth Circuit.

Thomas B. Morgan, appellant, v. C. B. Horrall, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California, appellee. No. 12,021.

Jun. 20, 1949.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before, Mathews, Healy and Bone, Circuit Judges.

Bone, Circuit Judge.

Appellant was arrested in the City of Los Angeles, California and held by its Chief of Police upon a warrant issued by the Governor of the State of California authorizing the removal of appellant to the State of Colorado for trial upon criminal charges filed against him in the courts of Colorado. The said warrant was issued by the Governor of California upon a demand by the Governor of Colorado for surrender of appellant for the purpose of criminal prosecution in Colorado.

When the Governor of California issued the warrant for the arrest of appellant, the Governor had before him the following papers:

1. Requisition or demand by the Governor of Colorado.
2. Application for Requisition.

3. Copy of complaint and information, subscribed and sworn to before a magistrate.[1]
4. Warrant issued out of the Justice Court.
5. Affidavit of Emma Hoelzle, sworn to before a magistrate.
6. Affidavit of Margaret M. Phillips, sworn to before a magistrate.

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[1]"CONSPIRACY TO COMMIT GRAND LARCENY

"In the Justice Court Before David W. Oyler, J. P.

State of Colorado,
City and County of Denver—ss.

The Complaint and Information of Ross L. Hanmerman made before David W. Oyler, Esq., one of the Justices of the Peace in and for the City and County of Denver, and State of Colorado, on the 26th day of May, A. D. 1948, who being duly sworn, on oath says that Tom Morgan on, or about the First day of March, A. D. 1948, at, to-wit, the City of Los Angeles, State of California, did then and there unlawfully and feloniously agree, conspire and cooperate with Earl Orms and Douglas D. Aylesworth and Paul Harris Singer, to and with each other, to do and to aid in the doing by them, or some one or more of them, at the City and County of Denver, State of Colorado, an unlawful act, to wit: a felony, which felony was Grand Larceny of the sum of Four Thousand Dollars ($4,000.00) in money of the value of Four Thousand Dollars ($4,000.00) of the moneys and personal property of the Daniels and Fisher Stores Company, a corporation, which conspiracy intentionally resulted in the commission of a felony, to wit: Grand Larceny of Four Thousand Dollars ($4,000.00) in money of the moneys and personal property of the Daniels and Fisher Stores Company, a corporation, on the Thirteenth day of March, A. D. 1948; in the City and County of Denver, and State of Colorado; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado. He therefore prays that the said Tom Morgan may be arrested and dealt with according to law.

(Sig.) Ross L. Hennerman

Subscribed to and sworn to before me this 26th day of May, A. D. 1948.

(Seal) (Sig.) David W. Oyler
Justice of the Peace."

7. Affidavit of Ross L. Hennerman, sworn to before a magistrate.
8. Affidavit of Fred Staab, sworn to before a magistrate.

Also attached were copies of statements by one Singer and one Aylesworth. These were not submitted as independent affidavits, but were exhibits made part of an affidavit executed before a magistrate.

It also appears that in the demand on file in the office of the Governor of California, the Governor of Colorado certified to the correctness of certain necessary documents.

Section 1549.1 of the California Penal Code appears to be a part of the Uniform Criminal Extradition Act which has been adopted in many states. It reads as follows:

> "Sec. 1549.1. Surrender of person not in other state when committing act resulting in crime therein. The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in demanding State at the time of the commission of the crime, and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other State."

Section 1548.2 of the Penal Code of California provides that demand may be accompanied by a copy of an indictment, by a copy of an information, or by a copy of an affidavit made before a magistrate, together with a copy of a warrant issued thereon, duly certified. These provisions would appear to be applicable as a description of the necessary accompanying papers and their certification, although certain provisions in Section 1548.2 obviously do not apply to the demand under Section 1549.1. We are satisfied that under California law the sufficiency of the record depends upon whether there are in the record certified copies of documents necessary to confer jurisdiction upon the Governor of California and that in this instance there were sufficient papers in the extradition record file to confer such jurisdiction.

The finding of the lower court that the papers submitted to the Governor of California were sufficient is in accordance with the opinion of the lower court and in accordance with the holding of the California courts of last resort. (See cases cited in opinion referred to in footnote 2.)

After the arrest of appellant an application for a writ of habeas corpus was filed in the District Court of Appeal in and for the Second District of the State of California, Division 8. This intermediate appellate court rendered an opinion on June 15, 1948, discharging the writ and remanding appellant to custody.[2]

Thereafter, on June 16, 1948, appellant filed a petition for the issuance of a writ of habeas corpus in the Supreme

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[2] *Ex parte* Morgan, 194 Pac. 2d 800. In this decision the court considered and passed upon Constitutional questions involved.

Court of the State of California, which petition was denied on June 21, 1948, without hearing. In legal effect this denial made the decision of the District Court of Appeal a final decision on the merits of appellant's case under California law. (See Gordon v. Scudder, 163 F. 2d 518, and Ex parte Adamson, 167 F. 2d 996.)

Thereafter, appellant filed a petition for a writ of habeas corpus in the District Court of the United States. That court issued the writ and held a hearing thereon as a result of which the judge discharged the writ and remanded appellant to the custody of the Los Angeles Chief of Police. This appeal followed. The opinion of the District Judge is reported in 78 Fed. Supp. at page 756.

In epitome, the errors here asserted by appellant and relied upon by him as requiring a reversal, are as follows: (1) Section 1549.1 of the Penal Code of the State of California, *supra,* is invalid because it conflicts with or is repugnant to the United States Constitution, and to the provisions of Title 18, U. S. C. A. §3182 enacted under authority of Section 2, Clause 2 of Article IV of the Constitution;[3] (2) It is admitted that appellant was never in the State of Colorado and never "fled" from Colorado. The warrant of arrest is void because appellant is not a fugitive from justice. (3) The complaint issued by the Magistrate's Court in the State of Colorado does not charge a crime against the laws of that State. (4) The complaint upon which demand for requisition was made

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[3]A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

is copied directly from said Section 1549.1 of the California Penal Code and not from any of the laws of Colorado; that while it may be conceded that appellant violated the laws of the State of Colorado, he is not in the present Complaint so charged, but is charged with having committed a crime against the laws of California.[4]

The lower court made and entered Findings of Fact and Conclusions of law in which it rejected all of the material contentions of appellant. The record also discloses that the same material and controlling issues were submitted to the California Supreme Court and to the California District Court of Appeal, and the decision of both courts was adverse to appellant's contentions. As clearly indicated in the reported decision of the California District Court of Appeal (194 P. (2d) 800) that court gave full consideration to the effect of California and Federal law and to the Federal Constitutional issue presented. With this record before it the Supreme Court of California refused a review of the decision of the District Court of Appeal. The interpretation by these State courts of the meaning and applicability of California statutes, as related to the facts of this case, is not to be disturbed in the absence of a clear and convincing showing of a violation of appellant's rights under the Federal Constitution. We are persuaded that such a showing has not been made in this case. See Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 543 and Huddleston v. Dwyer, 322 U. S. 232, 236.

In conclusion it is to be noted that appellant made no attempt to secure from a Justice of the California Supreme

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[4]See text of Section 1549.1, *supra*.

Court or from a Justice of the Supreme Court of the United States a stay of execution of the judgment of the State Courts—this for the purpose of securing allowance of a reasonable time in which to obtain a writ of certiorari from the Supreme Court of the United States. The reason assigned by appellant for this failure is that he was told by the Clerk of the Supreme Court of California that that Court did not *usually* grant stays and that it would take time to prepare a petition for certiorari.

Upon this showing appellant successfully contended in the lower court that his case was one of "peculiar urgency" which gave that court "jurisdiction" to entertain his petition for a writ of habeas corpus. Ex parte Hawk, 321 U. S. 114.[5] However, the question of "jurisdiction" was not presented on this appeal and such an issue is not before us.

While we are in entire agreement with the trial court's disposition of this case on the merits, we nevertheless think that the lower court ought not to have entertained Morgan's petition in view of the fact that under the Rules of the Supreme Court of the United States (38(6)) a stay for a reasonable time might have been obtained from

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[5]See Young v. Ragan, U. S. Sup. Ct., decided June 6, 1949, note 1: "Existing law as declared by *Ex parte* Hawk was made part of the statute by the new Judicial Code, 28 U. S. C. Sec. 2254, which provides: * * *." See also Stonebreaker v. Smythe (4-Cir.), 163 F. 2d 498, 501 (decided prior to adoption of the new Judicial Code) in which the principle underlying Sec. 2254 was applied.

a Justice of the Supreme Court of the United States for the purpose of permitting preparation of a formal application for certiorari. See Title 28 U. S. C. A. sec. 2101 (e). If some rational balance is to be preserved in the matter of handling petitions for writs of habeas corpus in Federal District Courts it is proper that petitioners should be required to exhaust available remedies under the present liberal procedure which seems wholly adequate to meet a situation of the character here presented. (See footnote 5.)

The order of the lower court which discharged the writ and remanded appellant to the custody of appellee is affirmed.

(Endorsed:) Opinion. Filed Jun. 20, 1949. Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

October Term, 1949.

No.....

THOMAS B. MORGAN,

Petitioner,

vs.

C. B. HORRALL, Chief of Police of the City of Los Angeles, County of Los Angeles, State of California,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Thomas B. Morgan, was arrested in the City of Los Angeles and is now in the custody of the Chief of Police of the City of Los Angeles, upon a warrant issued by the Governor of the State of California authorizing the removal of said petitioner to the State of Colorado for trial upon criminal charges filed against him in the courts of the State of Colorado [R. 44-45].

The said warrant was issued by the Governor of California upon a demand by the Governor of Colorado for surrender of said petitioner for the purpose of criminal prosecution in the State of Colorado. The Governor of California, in issuing said warrant, had before him a copy of the complaint and information charging the said petitioner with the criminal offense of conspiracy to commit grand larceny [R. 53]; a copy of the warrant of arrest issued by a magistrate of the State of Colorado [R. 55]; an application for requisition to the Governor of Colorado [R. 50]; the requisition of the Governor of Colorado to the Governor of California [R. 49]; the affidavit of principal complaining witness as to the commission of crime [R. 56], and the affidavits of corroborating witnesses to commission of crime [R. 60, 62, 64-86]. The certificates of authentication by the Colorado authorities appear in the record at pages 87 to 91, inclusive. After the arrest of petitioner, an application for a writ of habeas corpus was filed in the District Court of Appeal, in and for the Second District, State of California, Division 2 [R. 3]. Said court rendered an opinion on June 15, 1948, discharging said writ and remanding appellant to custody [R. 4-5]. On June 16, 1948, petitioner filed a petition for the issuance of a writ of habeas corpus in the Supreme Court of the State of California, and on June 21, 1948, said court denied the petition without hearing [R. 4].

Thereafter, a petition for a writ of habeas corpus was filed in the District Court of the United States, Southern District of California, Central Division [R. 2]. Said District Court rendered its decision and order on July 6, 1948, discharging the writ issued [R. 92] and rendered

a written opinion [R. 92-106]. Findings of fact and conclusions of law [R. 107-110] and the judgment [R. 111] of said court were filed July 12, 1948. An appeal from said judgment was taken to the United States Court of Appeals, for the Ninth District, and it is that judgment [R. 168, 177], affirming the lower federal court's decision, which petitioner seeks to have reviewed by this court.

I.

Section 1549.1 of the California Penal Code Is Not Invalid or Repugnant to the Constitution.

Section 1549.1 of the California Penal Code is a part of the Uniform Criminal Extradition Act which has been adopted in more than thirty of the United States. Said section reads as follows:

> "Sec. 1549.1. *Surrender of person not in other state when committing act resulting in crime therein.* The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other states."

Section 1548.2 of the California Penal Code, reads as follows:

> "Sec. 1548.2 *Form and requisite allegations of demand: Necessary accompanying documents: Forms: Authentification.* No demand for the extradition of a person charged with crime in another State shall be reconized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

Article IV, clause 2 of Section 2 of the United States Constitution, reads as follows:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

The extradition provisions of the Federal Constitution and Federal Statutes relating to extradition are to be liberally construed to effectuate and expedite the administration of justice.

Brewer v. Goff, 138 F. 2d 710.

The Federal Constitution and statutes do not undertake to regulate the extradition of persons who, while outside a state, commit acts which result in a crime in such state.

> "The validity of legislation in aid of the act of Congress concerning extradition is now well established."
>
> *Dennison v. Christian,* 196 U. S. 637.

It has been held that a state may legislate upon a subject of extradition unprovided for because Congress failed to extend Section 5278 of the Revised Statutes, now cited as Title 18, U. S. C., Sec. 3182, to the full limits of constitutional power.

Innes v. Tobin, 240 U. S. 127;

In re Tenner, 20 Cal. 2d 670.

The federal statute on the subject of extradition (18 U. S. C. A., Sec. 662, now cited as Title 18, U. S. C., Sec. 3182) does not purport to cover the entire field of extradition. It mentions only one class of persons—those who flee from the state in which the crime was committed and who are fugitives from justice.

> *In re Morgan,* 86 Cal. App. 2d 217 [R. 5]; 78 Fed. Supp. 756 [R. 98-101].

Section 1549.1, quoted above, does not provide for the extradition of persons who have fled, but does cover per-

sons in an entirely different category—those who commit an act in one state intentionally resulting in a crime in another state. It is clear, therefore, that each statute refers to a subject different and distinct from the other, and that there is no conflict between them. Each is enforceable in its own sphere.

The section of the Uniform Extradition Act providing for extradition of one not in the demanding state at the time of the commission of the crime against its laws, and who had not fled therefrom, was held not to be contrary to the federal constitutional provision of Article IV, Section 2, nor was it held unconstitutional in *Cassis v. Fair,* 29 S. E. 2d 245, 151 A. L. R. 233.

Similar holdings are found in the following cases:

Ennist v. Baden, 28 So. 2d 160 (Fla., 1946);

Ex parte Campbell, 25 N. W. 2d 419 (Neb., 1946);

English v. Matowitz, 72 N. E. 2d 898 (Ohio, 1947);

State ex rel. Gildar v. Kriss, 62 A. 2d 568.

This same provision was held to be a valid exercise of the police power of the state, and within the powers reserved to the state; hence not in conflict with the constitutional provision involved in the case of *Culbertson v. Sweeney,* 44 N. E. 2d 807, 70 Ohio App. 344. (Appeal to State Supreme Court dismissed because no debatable constitutional question involved. 140 Ohio St. 426, 45 N. E. 2d 118.)

The case of *Innes v. Tobin,* 240 U. S. 127, involved the right of the State of Texas to honor the demand of

the Governor of Georgia for a person who had been brought into Texas by extradition from Oregon.

The court in the last named case said, at page 135:

> "No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the (federal) statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for, not beyond the pale of all law, but subject to the power which then controlled them,—state authority until it was deemed essential by further legislation to govern them exclusively by national authority."

As suggested by the above quoted language, it was not the intention of the framers of the Constitution, or of Congress, to create a situation in which a state could be required to become the asylum for persons who engaged, by means of conspiring with others, in the commission of crimes in other states and there participate in the preparation for or consummation of such crimes.

The question of the constitutionality of Section 1549.1 of the California Penal Code was passed upon by the District Court of Appeal of the State of California and, in legal effect, also by the State Supreme Court. The interpretation by these state courts upholds the validity of said section.

In re Morgan, 86 Cal. App. 2d 217 [R. 5].

II.

The Documents Submitted to the Governor of the State of California Are Sufficient.

The following documents were submitted to the Governor of California:

1. Requisition or demand by the Governor of Colorado [R. 49];
2. Application for requisition [R. 50];
3. Copy of complaint and information, subscribed and sworn to before a magistrate [R. 53];
4. Warrant issued out of the Justice's Court [R. 55];
5. Affidavit of Emma Hoelzle, sworn to before a magistrate [R. 56];
6. Affidavit of Margaret M. Phillips, sworn to before a magistrate [R. 60];
7. Affidavit of Ross L. Hennerman, sworn to before a magistrate [R. 62];
8. Affidavit of Fred Staab, sworn to before a magistrate [R. 64].

Also attached were copies of statements by one Singer [R. 68] and one Aylesworth [R. 73]. Said statements were not submitted as independent affidavits, but were exhibits made part of an affidavit executed before a magistrate.

It also appears that in the demand on file in the office of the Governor of California, the Governor of Colorado certified to the correctness of certain documents [R. 49].

Section 3182, U. S. C., Title 18 (18 U. S. C. A. 662), provides that demand may be made upon the production of a copy of an indictment or an affidavit, charging that a person named has committed a certain offense, certified as authentic by the governor of the demanding state.

Section 1548.2 of the California Penal Code provides that demand may be accompanied by a copy of an indictment, by copy of an information, or by a copy of an affidavit made before a magistrate, together with a copy of a warrant issued thereon, duly certified.

It would appear that by reason of the provisions of Section 1549.1 of the California Penal Code, the provisions above referred to in Section 1548.2 are applicable as a description of the necessary accompanying papers and their certification, although obviously there are certain provisions in Section 1548.2 which do not apply to the demand under Section 1549.1.

The sufficiency of the record depends upon whether there are in the record certified copies of documents necessary to confer jurisdiction upon the Governor of this State, and not upon whether there may be found in the file other papers, which, considered in and of themselves alone, would be insufficient. To state the proposition differently, if there be sufficient papers in the file to confer jurisdiction, the presence of superfluous papers in the file does not destroy the effectiveness of the proper documents.

The complaint in the file is also an affidavit within the meaning of Section 1548.2 of the California Penal Code.

In re Davis, 68 Cal. App. 2d 798, 808.

What has been said above is not to be construed as admission by respondent that the affidavits signed by the various parties, and in particular the affidavit of Fred Staab [R. 64], are not properly a part of the official record which the Governor of California was at liberty to consider in determining the sufficiency of the record accompanying the demand.

The finding that such papers submitted were sufficient, is in accordance with the opinion of the Federal District Court [R. 101], and in accordance with the expression of the highest court of the State of California.

In re Morgan, 86 Cal. App. 2d 217.

III.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236;

Neblett v. Carpenter, 305 U. S. 297, 302.

Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then-controlling decision of the highest state court.

Vanderbach v. Owens-Illinois Glass Co., 311 U. S. 538, 543.

It is submitted that the decision of the District Court of Appeal of the State of California in the matter of *In re Thomas B. Morgan*, 86 Cal. App. 2d 217 [R. 5] (Petition for Writ of Habeas Corpus denied without hearing in California Supreme Court [R. 4]), is controlling upon this court as to all matters passed upon therein and as are applied to the laws of the State of California, including the validity of Section 1549.1 of the California Penal Code, the sufficiency of the papers submitted to the Governor of California, and the sufficiency of the showing that petitioner was subject to prosecution in the State of Colorado.

IV.

The Warrant Issued by the Governor of California Is Legally Sufficient.

The true test of a warrant of extradition is not in its form, but in the right to issue such a document for the return of a person accused of crime. The authorities hereinbefore cited affirmatively establish that right in this case.

It has been held that the warrant issued by the Governor of an asylum state is *prima facie* evidence of the existence of every fact which that executive was obligated to determine before issuing it.

> *Ex parte Noble,* 198 S. W. 2d 893 (Tex. Cr. App.).

Where an extradition warrant recited an erroneous date of the alleged crime, there being undisputed evidence of the correct date of its commission, it was held not sufficient to require a discharge on habeas corpus.

> *Ex rel. Jackson v. Meyerling,* 54 F. 2d 621; cert. denied, 286 U. S. 542.

It has been stated that, where an extradition warrant showed that the demand of the governor of the demanding state was accompanied by copy of a complaint, warrant, affidavits and certificates, the executive warrant was sufficient as against the contention that the warrant did not recite what proof was offered to the issuing governor on which he based the extradition warrant.

> *Ex parte Cupp,* 84 S. W. 2d 731, 129 Tex. Cr. R. 25.

It is submitted that the portion of the first paragraph of said warrant [R. 44-45], which recites "and that he has fled from justice of that State, and has taken refuge in the State of California," is surplusage and should not affect its validity. The provisions of Section 1549.1, under which this warrant was issued, require a demand of the executive authority of another state for the surrender of a person in this state charged in such other state with committing an act in this state intentionally resulting in a crime in the state whose executive authority is making the demand. The warrant so issued includes the required findings of said section, and the record discloses that the surplus matter was in fact erroneously placed therein, being contrary to the evidence. If this portion were stricken, the warrant would still be sufficient to comply with the requirements of said Section 1549.1 of the California Penal Code.

The same is true of the language of paragraph two of said warrant, "Certified by the Governor of California" [R. 45]. Clearly the record shows that the papers submitted were certified by the Governor of Colorado [R. 49] and not by the Governor of California. That further portion of paragraph two, "and that said Tom Morgan is a fugitive from justice of the aforesaid State," appears to be surplusage and contrary to the facts, as are the words, "from which he fled," in the third paragraph. The warrant appears to be a regular form used, and includes language of the federal statute which respondent submits is not applicable to the present case and should not invalidate the authority and effect of a warrant to extradite under Section 1549.1 of the California Penal Code.

V.

Petitioner Is Subject to Prosecution Under Colorado Statutes.

The petitioner is charged with the crime of conspiracy to commit grand larceny, a felony under the laws of the State of Colorado. Section 177 of Chapter 48, Statutes of 1935, provides as follows:

> "If any two or more persons shall conspire to agree, falsely and maliciously, to charge or indict, or be informed against, or cause to procure to be charged or indicted or informed against any person for any criminal offense, or shall agree, conspire or cooperate to do, or to aid in doing any other unlawful act, each of the persons so offending shall upon conviction, in case of a conspiracy to commit a felony, be confined in the penitentiary for a period of not less than one year, nor more than ten years, and in the case of a conspiracy to commit a misdemeanor, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment."

Under the laws of the State of Colorado, an accessory is deemed to be a principal.

> "An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be

deemed and considered as principal and punished accordingly . . ."

Section 13, Chapter 48, Stats. of 1935.

The courts of Colorado have held that an accessory may therefore be charged as a principal.

Mulligan v. People, 68 Colo. 17.

In *Newton v. People,* 60 Colo. 246, the defendant was charged with the crime of larceny of a steer. The facts showed that the defendant, Mrs. Newton, was never in Colorado in connection with the theft, but was at all times in New Mexico. The court stated:

"Had this crime been committed in one county in Colorado, and advised and encouraged in an adjoining county in the same state, it would scarcely be contended that the omission of the allegation of that diversity would be fatal to the information. If not, we fail to see the logic of the position that a different rule applies if the counties are in different states. The identical question has been decided under an almost identical statute. State of Nevada v. Chapman, 6 Nev. 320.

"There the accessory, who never left the state of California, was charged, tried and convicted of a train robbery in Nevada. His position was similar to that of Mrs. Newton here. The Supreme Court of Nevada held against him. We think its reasoning sound and its conclusion correct, and note no material distinction in the issues."

In the case of *Updike v. People,* 92 Colo. 125, the court therein also stated that one may perpetrate an offense against a state or county upon whose soil he never touched foot.

It is a well recognized principle in the law that, in order to charge one as an aider and abetter, or conspirator in crime, it is not necessary to establish his presence at the scene of the crime. Constructive presence is sufficient.

English v. Matowitz, 72 N. E. 2d 898;

Commonwealth v. Hollister, 157 Pa. 13;

Hyde v. U. S., 225 U. S. 347;

State of Kansas v. Wolkon, 110 Kan. 722.

It is therefore submitted that the crime with which the petitioner is charged was actually committed against the State of Colorado, and that the courts of that state have jurisdiction to prosecute him therefor, to the same extent as if he were personally present at the time of the actual commission of the consummated offense of larceny.

VI.
Conclusion.

The petition for writ of certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the Circuit Court of Appeals has decided a federal question in conflict with applicable decisions of this court. There appears in this case no reason, either in law or in good conscience, why the petition should be granted.

The respondent respectfully prays that the petition be denied.

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